

1 he was otherwise denied due process of law in the State court
2 proceeding. This notice is based on the notice and opposition,
3 the supporting memorandum of points and authorities, the
4 petition for writ of habeas corpus, exhibits, the Court records
5 in this action, and other such matters properly before this
6 Court.

7 INTRODUCTION

8 On March 19, 2008, this Court issued an Order directing
9 Respondent to Show Cause why a writ of habeas corpus should not
10 be issued. Respondent was instructed to either file with the
11 Court and serve upon Petitioner an Answer conforming in all
12 respects to Rule 5 of the Rules Governing Section 2254 cases, or
13 in lieu of an Answer, to file a motion to dismiss on procedural
14 grounds as set forth in the Advisory Committee Notes to Rule 4
15 of the Rules Governing Section 2254 cases. Respondent chose the
16 latter, and on July 11, 2008 filed a motion to dismiss.

17 This Court should deny respondent's motion to dismiss
18 because 1) Petitioner's claims are cognizable under federal law,
19 2) all claims have been fully exhausted in all three state
20 courts prior to filing in this Court, and 3) Petitioner did not
21 receive a full, fair, and adequate hearing in the state courts.
22 Accordingly, the Court should deny Respondents motion to dismiss
23 and direct respondent to file with this Court and serve upon
24 Petitioner, an Answer conforming in all respects to Rule 5 of
25 the Rules Governing Section 2254 cases, showing cause why a writ
26 of habeas corpus should not be issued.

MEMORANDUM OF POINTS AND AUTHORITIES**I. RESPONDENT ERR IN ASSERTING THAT PETITIONER DOES NOT ALLEGE A FEDERAL QUESTION**

Respondent contends that "claims one and two of the Petition should be dismissed because they do not allege a federal question." See Motion to Dismiss, p. 2. Respondent's contentions are belied by the record before this Court.

For example, claim one ask:

"Was Petitioner deprived due process of law when the State court concluded contrary to 'clearly established' United States Supreme court precedent that Petitioner has no liberty interest in parole and then denied Petitioner's claim without any evidentiary support in the record tending to establish the Board of Parole Hearings' allegation that the decision portion of the hearing could not be transcribed?"

See Pet. at p. 1. Liberally construed, the allegation is sufficient to warrant federal review. See U.S. Const., Amend. XIV, § 1 (holding that "no state shall deprive any person of life, liberty or property without due process of law").

In McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002), the Ninth Circuit held that "'clearly established' Federal Law, as determined by the Supreme Court of the United States' provides that California prisoners[] have a cognizable liberty interest in release on parole." Id. at p. 900. The Court went on to explain that the "governing rule in this area was articulated by the Supreme Court in Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 60 L.Ed.2d 668, 99 S.Ct.2100 (1979), and Board of Pardons v. Allen, 482, U.S. 369, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987)." See McQuillion, supra, 306 F.3d at p. 900; see

1 also Biggs v. Terhune, 334 F.3d 910, 915 (9th Cir. 2003) (noting
2 that "[t]he liberty interest is created, not upon the grant of
3 a parole date, but upon the incarceration of the inmate"). The
4 Ninth Circuit further added in Irons v. Carey, 505 F.3d 864
5 (9th Cir. 2007), that a prisoner's due process rights are
6 violated if the Board's decision is not supported by "some
7 evidence in the record," or is "otherwise arbitrary." Id.
8 at p. 851; see also Sass v. California Bd. of Prison Terms,
9 461 F.3d 1123, 1128-1129 (9th Cir. 2006), citing Superintendent
10 v. Hill, 472 U.S. 445, 457 (1985).

11 Here, the first two claims of the petition challenges the
12 superior court's decision as involving an unreasonable applicat-
13 ion of firmly established United States Supreme Court precedent
14 and an unreasonable determination of the facts in light of the
15 record. As reflected in the superior court's order, after
16 "review[ing] all documents filed in the case" (Pet's Ex. W at
17 p. 3) the superior court disregarded the "some evidence"
18 standard articulated in Hill, and concluded contrary to Supreme
19 Court authority that "Petitioner did not have a liberty interest
20 in [parole]." See Pet's Ex. W at pp. 3-6; McQuillion, supra,
21 306 F.3d at pp. 901-902. Further, by failing to correctly
22 apply the "some evidence" standard to the facts of this case,
23 the court allowed an arbitrary board decision to deprive
24 Petitioner of his concomitant right to an available remedy.
25 Resp't's Ex. 1 at p. 22; Ex. 6 at p. 4(c).

26 Respondent cite to Estelle v. McGuire, 502 U.S. 62, 67-68
27 (1991) for the proposition that "Federal habeas relief is not
28

1 available to 'reexamine state-court determinations on state-law
2 questions.'" See Motion to Dismiss, p. 2. However, this case
3 is not applicable to the issues before this Court because
4 Petitioner did not challenge the superior court's interpreta-
5 tion of state law. Consequently, Respondent's reliance on
6 McGuire is misplaced. Similarly, Respondent's reliance on
7 Pulley v. Harris, 465 U.S. 37, 41 (1984), is also misplaced.
8 Like McGuire, Harris has no effect when applied to Petitioner's
9 case. In fact, the Harris, Court ruled that a writ may issue
10 "if it is found that [the] prisoner is in custody 'in violation
11 of the constitution or laws or treaties of the United States.'" Harris,
12 supra, 465 U.S. at 41. Such as those at issue here.

13 Respondent's final effort on the federal question front is
14 to cite Langford v. Day, 110 F.3d 1380, 1389 (9th Cir. 1996),
15 for the proposition that "a habeas petitioner may not transform
16 a state law issue into a federal one merely by asserting a due
17 process violation." Motion to Dismiss, p. 2. However, on this
18 record, not only has it been Petitioner's position from the
19 very beginning, -- "that the issue is not based on the alleged
20 malfunction of the recording equipment, but rather, on a lost or
21 missing tape," (Resp't's Ex. 6 at 3(h)) -- but also, the superior
22 court agreed with him on this point when it admonished that "[n]o
23 mandate is set forth requiring a rehearing [disapproval/
24 rescission] where, as here, the recording equipment malfunctions
25 of staff simply neglects to produce all tapes for transcription."
26 Pet's Ex. N at p. 2. Accordingly, Respondent's reliance on
27 Langford is misplaced.

1 Because California law creates a federally protected
2 liberty interest in parole, in which board decisions must be
3 supported by "some evidence" in the record, claims one and two
4 are cognizable under federal law. Thus, Respondent's Motion to
5 Dismiss should be denied.

6
7 **II. RESPONDENT ERR IN ASSERTING THAT PETITIONER'S DUE
PROCESS CLAIMS IS UNEXHAUSTED**

8 Respondent based his non-exhaustion argument on two claims
9 he contends Petitioner did not raise "in his habeas petition
10 filed in the appellate court." Motion to Dismiss, p. 4, lns
11 1-7. Respondent do not allege that the factual claims made by
12 Petitioner have change. Instead, Respondent complains that
13 Petitioner did not exhaust the available state court remedies
14 with respect to his claims that "the Board violated his due
15 process rights by finding him unsuitable for parole solely
16 because the entire transcript was unable to be transcribed" and
17 that "the state court determined that he did not have a liberty
18 interest in parole." Id

19 Respondent err. The fundamental nature of the Due Process
20 clause claim is based on the fact that the Board arbitrarily
21 overturned Petitioner's finding of suitability¹ and that the
22 superior court upheld the determination without there being any
23 evidentiary support in the record.

24
25

1. The Honorable Marla O. Anderson, Monterey Superior
26 Court Judge' Order of June 6, 2004 address this due process
claim for relief. See Pet's Ex. N. at p. 2.

1 In Bland v. California Depart. of Corrections, 20 F.3d 1469
2 (9th Cir. 1994), the Ninth Circuit Court of Appeals held that:

3 "[i]n order to satisfy the exhaustion requirement,
4 the petitioner must have presented the substance of
his federal claim to the state courts."

5 Id. at p. 1473. The Court went on to explain that a federal
6 claim "is fairly presented if the petitioner has described the
7 operative facts and legal theories upon which his claim is
8 based." Id. at p. 1473; see also Tamapua v. Shimoda, 796 F.2d
9 262, 262 (9th Cir. 1986).

10 Respondent rely on a number of well known cases for his
11 non-exhaustion argument, Rose v. Lundy, 455 U.S. 509, 510 (1982),
12 William v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972), Johnson
13 v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996), Kim v. Villalobos,
14 799 F.2d 1317, 1318 (9th Cir. 1986) and even evoke the AEDPA
15 ("[An application shall not be deemed to have exhausted the
16 remedies...] 'if he has the right under the law of the State to
17 raise, by any available procedure, the question presented.'
18 28 U.S.C. § 2254(c).)" See Motion to Dismiss, at p. 3. But
19 these cases and section 2254(c) are not at issue.

20 In his state petitions, not only did Petitioner present the
21 operative facts in both the California Court of Appeal and the
22 Supreme Court, but he also presented the substance of his
23 federal habeas claims to those courts. Specifically, in both
24 Courts he argued that on September 24, 2004, he was found
25 suitable for parole by the Board of Parole Hearings and granted
26 a parole date (Resp't's Ex. 1 at p. 4; Ex. 6 at p. 3), and that

1 shortly thereafter the Board rescinded the parole grant due to
2 an alleged "malfunction of the recording equipment." Id. He
3 further argued that the Board had deprived him of his constitut-
4 ional right to due process when it disapproved and rescinded its
5 finding of suitability based solely on the fact that the Board
6 lost the tape containing the decision portion of the hearing.
7 Resp't's Ex. 1 at pp. 4, 10, 24-26; Ex. 6 at pp. 3(b), 3(h),
8 4-4(a), 4(c).

9 After the petition was denied in the superior court,
10 Petitioner submitted a petition for writ of habeas corpus in
11 the appellate court (Resp't's Ex. 6), followed by a petition for
12 review in the Supreme Court (Resp't's Ex. 1), giving those
13 Courts a full and fair opportunity to address the substance of
14 his claims. In the petitions, Petitioner challenged, inter
15 alia, the superior court's finding that he "did not have a
16 liberty interest in the [parole] decision." Particularly, he
17 argued that the reasoning of the court not only flies in the
18 face of Ninth Circuit law, but also repudiates California
19 Supreme Court precedent which expressly provides that "prisoners
20 possess a liberty interest in connection with parole decisions
21 rendered by the Board." Resp't's Ex. 1 at pp. 24-25. Thus,
22 Petitioner argued, the superior court had deprived him of "the
23 only available remedy fashioned to cure the abrogation of his
24 Constitutional right to due process." Resp't's Ex. 1 at p. 22;
25 Ex. 6, p. 4(m). Contrary to Respondent's contention, Petitioner
26 has fulfilled the exhaustion requirement as it relates to this
27 claim.

1 With respect to Respondent's contention that Petitioner
2 did not raise his claim -- "that the state court determined that
3 [he] did not have a liberty interest in parole" (Motion to
4 Dismiss, p. 4) -- in his habeas petition filed in the appellate
5 court, a review of the record clearly shows that Petitioner
6 makes essentially the same arguments in both California courts.
7 It appears that Respondent takes exception to the wording of
8 the claim, rather than its substance. Namely, that Petitioner
9 did not invoke the phrase "liberty interest." See Motion to
10 Dismiss, p. 4. Nevertheless, as found by the Ninth Circuit,
11 "[a]lthough a prisoner] did not invoke the talismanic phrase
12 '[liberty interest]' in state proceedings, [the] state prisoner
13 will not be denied access to the federal courts[.]" Tamapua,
14 supra, 796 F.2d at p. 263; see also 28 U.S.C. § 2254(d)(1)-(3).

15 As to the manner in which the claims were presented, the
16 Circuit Court explained that "[a] habeas petitioner may,
17 however, reformulate the claims made in the state court;
18 exhaustion requires only that the substance of the federal claim
19 be fairly presented." Id., at p. 262. Petitioner submits, on
20 this record the operative facts and legal theory upon which his
21 claims are based have been presented to both state courts, and
22 therefore, the state courts had a full and fair opportunity to
23 address the substance of Petitioner's claims. Tamapua, supra,
24 796 F.2d at p. 263; Bland, supra, 20 F.3d at pp. 1472-73. Thus,
25 the exhaustion requirements have been satisfied. Respondent's
26 contention to the contrary is wholly without support.

CONCLUSION

For all the reasons expressed herein, this Court should deny Respondent's motion to dismiss and direct Respondent to file with this Court and serve upon Petitioner, an Answer conforming in all respects to Rule 5 of the Rules Governing Section 2254 cases, showing cause why a writ of habeas corpus should not be issued. The Court should also reiterate its directive concerning "extensions of time."

Dated: 7/23/08

Respectfully submitted,



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